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THE TAKING ISSUE TRILOGY: THE BEGINNING OF THE END?

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I. INTRODUCTION

Following ten years of unsuccessful attempts,[1] the United States Supreme Court finally reached the merits, or at least the peripheries of the merits, of the so-called "taking issue"[2] in a trilogy of cases: *Keystone Bituminous Coal v. DeBenedictis*,[3] *First English Evangelical Lu-*

* The authors are practicing attorneys, described by Professor Gideon Kanner and attorney Michael Berger as "taking issue polemicists." Berger and Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1985). Although the authors represent both public and private sector clients in the land use field, their writings in the taking issue area have been decidedly against compensation, as a matter of constitutional jurisprudence, philosophy and common sense. *See, e.g.*, Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984); *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603 (1987). The authors have been counsel of record or have represented *amici* in a number of taking issue cases, including: Graham v. Estuary Properties, 399 So. 2d 1374 (Fla. 1981); Pinellas County v. Brown, 420 So. 2d 308 (Fla. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); Williamson County v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986).

1. Agins v. City of Tiburon, 447 U.S. 255 (1980); San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Williamson County v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer and Frates v. Yolo County, 106 S. Ct. 2561 (1986).

2. *Bosselman, Callies and Banta, The Taking Issue* (1973).

3. 107 S. Ct. 1232 (1987).

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theran Church v. Los Angeles County[4] and *Nollan v. California Coastal Commission*.[5] *First English*, in which the Court supposedly reached the critical[6] "remedies" aspect of the taking issue,[7] is the centerpiece of the "trilogy." Unfortunately, despite the extensive media coverage the case received,[8] the constitutional significance and practical meaning of *First English* is not readily apparent. Consideration of *First English* in light of the Supreme Court's recent treatment of the taking issue, however, allows the contours of the taking issue to emerge.

The purpose of this Article is neither to revisit nor rehash the hoary detail of the taking issue controversy. Rather, this Article explores the contours of the taking issue in light of the Court's recent decisions and describes, to the extent possible, the rules of law that currently control police power regulation of land use.

II. THE TRILOGY

The three cases that comprise the "taking issue trilogy" involve distinct factual circumstances and legal questions. In *Keystone*[9] the Court considered the constitutionality of a state statute which prohibited the mining of coal that would result in surface subsidence.[10] The Court found that the statute was a valid exercise of the state's police power and that the statute did not effect a taking. In *First English*[11] the Court held that compensation is mandated when a governmental action effects a taking, even if the taking is only temporary. The majority opinion refused to define what constitutes a taking. In *Nollan*[12] the

4. 107 S. Ct. 2378 (1987).

5. 107 S. Ct. 3141 (1987).

6. This aspect is critical to those afraid of the "police power hawks." *See* Kanner, *Inverse Condemnation in an Era of Uncertainty*, 1980 SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN 177.

7. Although the "taking issue" has been much debated, a universally recognized statement of the "issue" has yet to emerge. A review of the literature reveals at least two separate issues: 1) under what circumstances does a regulation effect a taking in the constitutional sense?; 2) if a regulation does effect a taking in the constitutional sense, do the fifth and fourteenth amendments require compensation?

8. The media attention was sensational if not accurate.

9. 107 S. Ct. 1232 (1987).

10. *Keystone* involved the constitutionality of a coal mining subsidence act, the same subject considered in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

11. 107 S. Ct. 2378 (1987).

12. 107 S. Ct. 3141 (1987).

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Court held that a development permit condition effected a taking when the condition failed to substantially advance a legitimate public interest. Although the cases were factually and procedurally different, each case involved the tension between state police power and fifth amendment private property rights, and each contributes to an evolving definition of the taking issue.

A. Keystone Bituminous Coal Association v. DeBenedictis

In *Keystone Bituminous Coal Association v. DeBenedictis*[13] the Association of Coal Miners alleged that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act[14] violated the takings and contract clauses of the United States Constitution. To avoid surface subsidence, the Act prohibited the Association from mining twenty-seven (27) million tons of coal. The Association argued that the restriction on mining constituted a taking of that coal under *Pennsylvania Coal v. Mahon*[15] and that the Act impaired the obligations of contracts. The Association brought action in the United States District Court for the Western District of Pennsylvania, seeking to enjoin the State of Pennsylvania from enforcing the Act's provisions. Granting the state's motion for summary judgment, the District Court rejected the Association's assertion that *Pennsylvania Coal* was controlling. The Third Circuit Court of Appeals affirmed. On writ of certiorari, the Supreme Court held that the Bituminous Mine Subsidence and Land Conservation Act failed to constitute a taking.

The Association argued that *Pennsylvania Coal* controlled and that the enactment of the Subsidence Act effected a taking. Writing for the majority,[16] Justice Stevens distinguished the Kohler Act in *Pennsylvania Coal*[17] from the Subsidence Act in *Keystone*. Justice Stevens initially observed that the record in *Keystone*, unlike the sparse record supporting the Kohler Act in *Pennsylvania Coal*,[18] contained substan-

13. 107 S. Ct. 1232 (1987).

14. PA. STAT. ANN. tit. 52, § 1406.1 (Purdon Supp. 1986).

15. 260 U.S. 393 (1922).

16. The majority was comprised of Justices Stevens, Brennan, White, Marshall and Blackmun.

17. 260 U.S. at 412.

18. The Court stated:

> The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety . . . we should think it clear that the statute does not disclose a public interest sufficient to

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tial factual support for the Subsidence Act. This evidence revealed that mining-induced subsidence caused significant and widespread harm.[19] Noting that the Kohler Act was not a bona fide exercise of the police power,[20] the Court emphasized that *Pennsylvania Coal* had no influence on their determination of the Subsidence Act's constitutionality. Determining the applicability of *Pennsylvania Coal* to *Keystone*, the majority noted that the so-called regulatory taking aspect of Justice Holmes' opinion was dictum, and therefore advisory.[21]

The majority relied on the Pennsylvania legislature's findings both that important public interests were at risk and that it designed the Subsidence Act to minimize mining-induced subsidence.[22] Contrary to

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warrant so extensive a destruction of the defendant's constitutionally protected rights.

Id. at 413-14.

19. Justice Stevens noted:

Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal. This lowering of the strata can have devastating effects. It often causes substantial damage to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. Its effect on farming has been well documented—many subsided areas cannot be plowed or properly prepared. Subsidence can also cause the loss of groundwater and surface ponds. In short, it presents the type of environmental concern that has been the focus of so much federal, state and local regulation in recent decades.

107 S. Ct. at 1237.

20. The coal company argued that the Kohler Act "was not a bona fide exercise of the police power, but in reality was nothing more than 'robbery under the form of law' " because its purpose was "not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few." *Id.* at 1241.

21. The fact that Holmes' opinion was dictum does not affect the Court's analysis and merely stimulates a snide reference in Chief Justice Rehnquist's dissent. He states, "In apparent recognition of the obstacles presented by *Pennsylvania Coal* to the decision it reaches, the Court attempts to undermine the authority of Justice Holmes' opinion as to the validity of the Kohler Act, labelling it 'uncharacteristically . . . advisory.' " *Id.* at 1253.

22. The statute states:

This Act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania.

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the circumstances surrounding the Kohler Act, the Court found that the Subsidence Act challenged in *Keystone* lacked indicia of a statute enacted solely to benefit private parties.[23] Although rejected by the Court in *Pennsylvania Coal,* the majority in *Keystone* accepted the proposition that the legislation was intended to protect the public interest in health, the environment and the fiscal integrity of the area, rather than to prevent damage to private landowners' homes.[24]

Moreover, the Court distinguished *Pennsylvania Coal* from *Keystone* in terms of the respective prohibitions on mining.[25] The *Keystone* majority determined that the issue was whether the regulations, as applied to the plaintiff's property, violated regulatory taking principles by

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PA. ANN. STAT. tit. 52, § 1406.2 (Purdon Supp. 1986).

23. 107 S. Ct. at 1242.

24. After concluding that the instant matter was distinguishable from the statute in *Pennsylvania Coal*, the Court answered what it characterized as an implicit assertion that *Pennsylvania Coal* had overruled the principles of Mugler v. Kansas, 123 U.S. 623 (1887). In *Mugler*, a Kansas distiller challenged a state constitutional amendment that prohibited the manufacture and sale of alcoholic beverages as an unconstitutional taking of its property. The Supreme Court recognized that the practical effect of the challenged provision was such that the distiller's machinery and buildings constituting a brewery were "of little value," but nevertheless rejected the challenge. Justice Harlan explained the Court's holding and established the dichotomy between the police power and the power of eminent domain that has been characterized as overruled in *Pennsylvania Coal*, that is, that a

> prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Mugler, 123 U.S. at 668-69. Justice Stevens, writing for the Court, rejected the implied assertion and affirmatively stated that the Court in *Pennsylvania Coal* could not have intended to overrule *Mugler* and its kin because just five years after *Pennsylvania Coal*,

> Justice Holmes joined the Court's unanimous decision in Miller v. Schoene, 276 U.S. 272, 48 S. Ct. 246, 72 L.Ed. 568 (1928), holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the State had ordered destroyed. . . . [I]t was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation.

107 S. Ct. at 1244-45.

25. 260 U.S. at 414. The Court in *Pennsylvania Coal* found that the Kohler Act had nearly the same effect for constitutional purposes as appropriating or destroying the coal. *Id.*

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making commercially impracticable the mining of "certain coal."[26] First, without attribution of authority, the Court stated that one alleging a regulatory taking must satisfy a heavy burden.[27] The Court emphasized that petitioner made merely a facial challenge to the Subsidence Act, and therefore, the "*only question before this court is whether the mere enactment of the statutes and the regulations constitutes a taking.*"[28] Citing *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*,[29] the Court noted that the mere enactment of a statute is unlikely to create a sufficient factual controversy to support a takings claim. As a result, the petitioner faced "an uphill battle in making a facial attack on the Act as a taking."[30]

The second step in the Court's takings analysis necessitated a "before and after" valuation of the petitioner's property interest.[31] This step, in turn, required the Court to determine which "unit of property" it had to evaluate. The majority stated that according to *Penn Central* a takings analysis should consider the affected property as a whole and avoid evaluating the impact of the regulatory program on individual interests.[32] The Court determined that the relevant property was the Association's entire holdings. Rejecting the Association's definition of the unit of property as the 27 million tons of coal which the Act prohibited removing, the Court identified 1.46 billion tons, located in thirteen (13) mines, as the subject of its diminution of

26. What the majority intended to refer to as "our regulatory taking cases" is unclear; however, the balance of the opinion suggests that Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978), is the centerpiece of those cases.

27. 107 S. Ct. at 1246.

28. *Id.* (emphasis added).

29. 452 U.S. 264 (1981).

30. 107 S. Ct. at 1247. Justice Stevens went on to note that the "hill is especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable to continue mining their bituminous coal interests in Western Pennsylvania." *Id.* at 1247-48.

31. Although the Court does not cite authority for the "before and after" value rule, it is clear that the Court is applying the takings analysis described in *Penn Central.*

32. 438 U.S. at 130-31. The Court found that:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole.*

Id. (emphasis added). Applying the test, the *Penn Central* Court found that the parcel as a whole was the city tax block designated as the landmark site.

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value test.[33]

The Court attempted to reconcile its unit of property analysis with the analysis in *Pennsylvania Coal*[34] that implied that a taking occurs regardless of the amount of coal the mining prohibition affects.[35] The Court in *Pennsylvania Coal* stated:

> What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine *certain coal* has very nearly the same effect for constitutional purposes as appropriating or destroying it.[36]

The Court in *Keystone* read the "certain coal" clause in conjunction with the conclusion in *Pennsylvania Coal* that the Kohler Act prevented commercially feasible mining. Therefore, the Court in *Pennsylvania Coal* had used a "unit of property" consonant with the unit the *Keystone* Court identified.

Using the 1.46 billion ton figure, the Court calculated that the Subsidence Act diminished the value of the Association's coal interests by merely two (2) percent.[37] In other words, the Court's diminution of value test revealed that the mere enactment of the Subsidence Act and its implementing regulations did not interfere with reasonable investment-backed expectations. The Court concluded that the petitioners failed to establish that the regulation denied them economically viable use of their property.[38]

The Association next claimed that since Pennsylvania enacted specific legislation recognizing the "support estate,"[39] the Court should consider the support estate alone as the relevant property unit for their taking analysis. The Association argued that in authorizing the transfer of the support estate as a separate interest in real property, the legislature had, as a matter of law, defined the unit of property to be the support estate. Applying their own version of the Court's diminution of value test, the Association urged that the Subsidence Act rendered

33. 107 S. Ct. at 1248.

34. *Id.* at 1249.

35. *Id.*

36. Pennsylvania Coal v. Mahon, 260 U.S. 393, 414 (1922) (emphasis added).

37. This diminution is slight in contrast to other decisions of the Supreme Court. For example, in the landmark zoning case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the reduction in value was 75%.

38. 107 S. Ct. at 1249.

39. "The support estate consists of the right to remove the strata of coal and earth that undergird the surface or to leave those layers intact to support the surface and prevent subsidence." *Id.* at 1250 (quoting from the court of appeals).

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the support estate valueless. The Association contended that the Act gave the surface owner stable land without having to pay the mine owners to acquire the support estate.

The Court rejected the Association's argument for two reasons. First, the Court again noted that taking jurisprudence does not divide property into distinct segments. Furthermore, although one could convey the support estate as a discrete interest, it was nevertheless just another strand in the bundle of property rights.[40] The second reason concerned the practical aspects of the support estate and value. The Court concluded that the support estate, though undoubtedly valuable in its own right, is profitable only in conjunction with another estate, such as the surface estate or the mineral estate.[41] Stating that even if it accepted the Association's view of the support estate as a distinct interest, the Court held that the Association had failed to satisfy the heavy burden of a facial taking challenge.[42]

Chief Justice Rehnquist dissented, and Justices Powell, O'Connor and Scalia joined in his opinion. For Rehnquist the case was simple. Rehnquist stated that for fifty-five years *Pennsylvania Coal* was the foundation of the Court's regulatory takings jurisprudence. *Keystone*, Rehnquist continued, interfered with private coal mining interests in a manner strikingly similar to the Kohler Act in *Pennsylvania Coal*.[43]

Rehnquist disputed both that the Subsidence Act is factually distinguishable from the Kohler Act as a statute directed at a legitimate public objective, and that the Act does not interfere with investment-backed expectations. The dissent critically reviewed *Pennsylvania Coal* to show factual similarities with *Keystone* far greater than the majority suggested. The Chief Justice completed his challenge to the majority's factual distinction succinctly, stating:

> Thus, it is clear that the Court has severely understated the similarity of purpose between the Subsidence Act and the Kohler Act.

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40. In effect, the Court simply rejected the Association's attempt to persuade the Court that distinct status under state law defined the unit of property in the takings analysis equation.

41. *Id.* Consistent with the court of appeals, the Court noted:

> although Pennsylvania law does recognize the support estate as a 'separate' property interest, it cannot be used profitably by one who does not also possess either the mineral estate or the surface estate.

Id.

42. The majority opinion goes on to discuss the Association's contracts clause challenge.

43. *Id.* at 1253 (Rehnquist, C.J., dissenting).

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> The public purposes in this case are not sufficient to distinguish it from *Pennsylvania Coal*.[44]

Nevertheless, the dissent shifted its focus from *Pennsylvania Coal* and went on to the "real" issue.[45]

According to the Chief Justice, the threshold question in a takings analysis is the nature of the government's purposes involved. In other words, if the purpose of the regulation is to eliminate a "nuisance", then the government would not have to pay compensation, and there would be no taking.[46] Although not relying on the principle, the majority indicated that the nuisance exception might support its position that no taking had occurred. Rehnquist disagreed and explained that the restricted activity in *Keystone* is not the type of regulation held to be within the nuisance exception. Chief Justice Rehnquist claimed that the nuisance exception was narrow and allowed the government to prevent a misuse of property. The nuisance exception in no way condones the prevention of a legal and essential use or an attribute of the property's ownership.[47] Explaining the substantive basis for the "narrow exception" and the purpose of restricting its use, Chief Justice Rehnquist turned to what he perceived to be the concerns underlying the fifth amendment.[48]

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44. *Id.* at 1255.

45. *Id.* at 1256. The dissent opined:

> The similarity of the public purpose of the present Act to that in *Pennsylvania Coal* does not resolve the question of whether a taking has occurred; the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power.

Id. This passage is difficult to understand in the context of Justice Scalia's opinion in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987), in which the Chief Justice joined In *Nollan* Justice Scalia stated that a regulation which does not substantially advance a legitimate public interest is a taking. How can a regulation which fails the "necessary predicate to the government's . . . taking power" test described by Rehnquist, still be a taking?

46. Justice Rehnquist stated:

> we have recognized that a taking does not occur where a government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.

Id. at 1256.

47. The circularity of the point is obvious. If a state law declares a use to be "illegal" then the "narrow exception" comes into play, i.e., any regulation comes within the exception.

48. *Id.* He wrote:

> [the Fifth Amendment] prevent[s] the 'public from loading upon one individual more than his share of the burdens of government, and says that when he surrenders to the public something more and different from that which is extracted from

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For the Chief Justice, the nuisance exception has only minimal application because of two narrowing principles. First, courts should limit the exception to regulations directed at discrete and narrow purposes, as distinguished from general economic regulations, which Rehnquist finds less important.[49] Second, the nuisance exception has never warranted complete extinction of a parcel of property's value.[50] In support of the latter proposition, the Chief Justice relied upon *Mugler v. Kansas*[51] to point out that although the result of a prohibition on a brewery was significant, it failed to violate the nuisance exception because "the prohibition on [the] manufacture and sale of intoxicating liquors made the distiller's brewery 'of little value', but did not completely extinguish the value of the building."[52]

Equally surprising is the Chief Justice's invocation of *Miller v. Schoene*[53] for the proposition that the Court has never authorized the complete extinction of the value of property. *Miller* provided a clear articulation of the government's authority to completely destroy property to abate a nuisance. Of course, *Miller* is only one of the cases in which the Supreme Court allowed the complete destruction of property

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other members of the public, a full and just equivalent shall be returned to him.' A broad exception to the operation of the Just Compensation Clause based on the exercise of the multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety and welfare.'

Id. at 1256-57.

49. It is impossible to discern whether Chief Justice Rehnquist actually intended to establish a hierarchy of regulatory purposes, or whether his musings are more accurately described as argumentatively directed to the majority opinion. When it is recalled that the majority did not in fact rely on the nuisance exception, the dissent's protests prove "too much."

50. This last proposition would undoubtedly not rest well with the owners of diseased plants and animals that have been completely destroyed to avoid the spread of disease. The value of animals destroyed annually to avoid the introduction of diseases in the country and protect the poultry industry is substantial. Owners have accepted these losses for years on the assumption that the complete destruction of a nuisance is not compensable under the takings clause.

51. 123 U.S. 623 (1887).

52. 107 S. Ct. at 1257. The distinction between the phrases "of little value" and "completely extinguishes the value of the building" is one of little difference.

53. 276 U.S. 272 (1928). *Miller* involved an economic protection regulation (in the hierarchy implied by Rehnquist, a less important purpose). The cedar trees, which the statute required to be destroyed to prevent a disease that affected apple trees, were virtually valueless except for firewood.

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without payment of just compensation. The dog case[54] and the alcoholic beverage cases[55] are examples of a tradition in the law that the Chief Justice failed to mention. Clearly, the complete destruction of alcoholic beverages required no compensation because it was a public action designed to eliminate a public nuisance.

The Chief Justice further confused his discussion by asserting that in none of the preceding cases "did the regulation destroy essential uses of private property."[56] Rehnquist overlooked that in each of the cases he referred to the regulation not only destroyed substantial uses, but also extinguished all possible property uses in some cases. Even if Rehnquist intended the word "essential" to denote the minimum use that is the benchmark of a regulatory taking, his statement ignored many decisions in which the Court sanctioned the complete destruction of nuisances without payment of just compensation.

The Chief Justice abruptly changed course and concluded that the enactment of the Subsidence Act completely destroyed the Association's interest in the 27 million tons of coal.[57] Chief Justice Rehnquist made two arguments to support this claim. First, the Act destroyed the value of the property. The mining prohibition rendered a landowner's interest in his coal valueless.[58] Second, the Chief Justice defined the relevant unit of property differently than did the majority.[59]

Rehnquist's view of the relevant parcel of land differed dramatically from that of the majority, and his analysis left unanswered many questions. According to Justice Rehnquist, the majority erred in concluding that the coal constituted a single indivisible property unit. The Chief Justice argued that the majority erred in failing to distinguish between regulatory takings and physical invasions. A physical inva-

54. Sentell v. New Orleans & C.R. Co., 166 U.S. 698 (1897).

55. The leading case is Samuels v. McCurdy, 267 U.S. 188 (1925); *see also* Clark v. Haberle Brewing Co., 280 U.S. 384 (1930).

56. 107 S. Ct. at 1257.

57. *Id.*

58. The Chief Justice did not attempt to deal with the record in *Keystone* which clearly indicated that the support estate had value to both the mineral estate and the surface or use estate.

59. He stated:

> the Court's broad definition of the 'relevant mass of property' . . . allows it to ascribe to the Subsidence Act a less pernicious effect on the interests of the property owner. The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel.

Id.

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sion is always a taking because a deprivation of property use, no matter how small, is a taking.[60] In contrast, allegations of a regulatory taking necessitate an analysis of the regulation's impact on the affected property.

At this point in the dissent, the Chief Justice attempted a feat of analytical legerdemain. The Chief Justice argued that a physical occupation is always a taking,[61] whereas only some regulatory actions are takings. Chief Justice Rehnquist asserted that regulations, unlike physical invasions, do not typically extinguish the full bundle of rights in a particular piece of property. He argued that the Court must evaluate the effects of governmental action in light of the factors enumerated in *Penn Central*. These factors include: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action.[62] These analytical steps are unnecessary in the event of a physical invasion. In other words, the Chief Justice argued that it is not necessary to apply the takings analysis established in *Penn Central* when a party alleges that a regulation destroys all use of property. The Chief Justice's sleight of hand thereby disposed of "taking jurisprudence" and the need for the majority's relevant unit of property analysis.

The trouble is that Rehnquist's opinion is contrary to a century of established law. Indeed, replacing the references to 27 million tons of coal in the argument with references to additional rents,[63] air rights,[64] or building setbacks,[65] reveals the contradictions inherent in the Chief Justice's argument. Although the Court has never held that a regulation preventing landowners from building above a prescribed height or beyond a setback constitutes a taking of what is an identifiable and separable segment of property, the Chief Justice ultimately adopted this position. Chief Justice Rehnquist further argued that the status of

60. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See also* Hodel v. Irving, 107 S. Ct. 2076 (1987).

61. This proposition is flatly rejected in *Nollan*, where Justice Scalia states that a physical occupation that would otherwise constitute a taking would not be a taking where the occupation substantially advances a legitimate public interest. Chief Justice Rehnquist joined in Justice Scalia's opinion.

62. 107 S. Ct. at 1259.

63. Block v. Hirsch, 256 U.S. 135 (1921).

64. *Id. See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

65. Gorieb v. Fox, 274 U.S. 603 (1928).

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the support estate, recognized as a separate interest in property, reinforced his conclusion that the Subsidence Act effects a taking. The Chief Justice forcefully asserted that the Court has always looked to state law[66] to define property and that the majority's rejection of the support estate as a separate and distinct interest is inappropriate. Again, having succeeded in articulating a basis for evaluating the regulation's impact on the 27 million tons of coal, the dissent argued that the Act effects a taking.

The significance of *Keystone* lies in the takings analysis that the Court employed to evaluate the impact of the regulation. A majority of the Court reaffirmed that absent a physical invasion, the Court looks to the impact of the governmental action on investment backed development expectations and employs the analysis set forth in *Penn Central*.[67] In particular, the *Keystone* Court affirmed that taking jurisprudence does not separate property into discrete segments for a takings analysis. Rather, the Court looks at the property as a whole.

B. First English Evangelical Lutheran Church v. Los Angeles County

The centerpiece of the taking issue trilogy, *First English Evangelical Lutheran Church v. Los Angeles County*,[68] involved a facial challenge to a temporary floodplain ordinance adopted by Los Angeles County. The Church owned a 21 acre parcel of land in a steep valley subject to periodic flooding. A flood had destroyed a series of camp buildings used for retreats and other purposes. In response to the flood, Los Angeles County adopted a temporary regulation that prohibited further development in the area subject to flooding. The ordinance contained no permitting or variance procedures. The Church sued the County, claiming that the ordinance denied the landowner all use of his property. The California Supreme Court, adhering to the principles of *Agins v. City of Tiburon*,[69] denied the Church's claims that enactment of the ordinance constituted a taking. The court ruled that under California law the Church's allegations sounding in inverse condemnation were irrelevant because the only relief the Church sought was just

66. The Chief Justice's argument is extremely clever on this point, but it conflicts with the settled proposition that although state law defines property, federal law defines takings.

67. 438 U.S. 104 (1978).

68. 107 S. Ct. 2378 (1987).

69. 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979).

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compensation and money damages.[70] The Church appealed and the California Court of Appeals declined the Church's entreaties to reconsider the *Agins* rule. On writ of certiorari, the Supreme Court finally considered the merits of the taking issue.[71]

For taking mavens of the no-compensation persuasion,[72] the fact that Chief Justice Rehnquist wrote the decision in *First English* portended bad news. After all, Rehnquist had dissented in *Penn Central Transportation Company v. City of New York*[73] and had stated in his concurring opinion in *San Diego Gas & Electric v. City of San Diego*[74] that he agreed with much of Justice Brennan's now-famous dissent.[75] Furthermore, Rehnquist had suggested that a total use prohibition of even part of a parcel of property constituted a compensable taking in his bitter dissent in *Keystone*.[76]

The opinion of the Court requires careful, almost laborious analysis, and even then, the import of the opinion lies hidden between the lines. According to the Chief Justice, the issue before the Court was whether a landowner who claims that an ordinance denies him the use of his property may recover damages for the period before the court finally determines that the regulation constitutes a taking. The Court answered this question affirmatively.[77]

First English is really two cases. There is the action the Supreme Court actually decided, and there is the case the taking issue devotees wished the parties had submitted to the Court. The actual case involved a narrow legal question, to which there was only one answer. If there is a taking, regardless of its cause or duration, the Constitution mandates that government pay just compensation to the landowner. Although the Court established this principle decades ago, the *First*

70. 107 S. Ct. at 2385.

71. *Id.* at 2383. Agins v. City of Tiburon, 447 U.S. 72 (1980); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Williamson County v. Hamilton Bank, 105 S. Ct. 3108 (1985); and MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986).

72. The authors are clearly members of the no-compensation camp.

73. 438 U.S. 104 (1978).

74. 450 U.S. 621 (1981).

75. Justice Rehnquist stated: "If I were satisfied that this appeal was from a 'final judgment or decree' of the California Court of Appeals, as that term is used in 28 U.S.C. 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633-34.

76. *See supra* text accompanying notes 45-74.

77. 107 S. Ct. at 2381.

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English reiteration of it in the context of a rambling, disjunctive discourse about taking precedents does nothing but confuse what has already been recognized as a "Serbian bog." The parties' use of the Supreme Court as a forum to debate the tangential issue of how to determine when a taking occurs added to the confusion.

After noting that the ordinances in question created a regulatory taking, the Court expressly disavowed any intention to address whether the regulations in fact effected a taking.[78] The Court commenced its analysis of the "remedy" question by referring to the language of the fifth amendment. Making an oblique observation that the language does not prohibit governmental taking of private property, the Court stated that instead the takings clause places a condition of repayment on the exercise of that power.[79]

The Court continued its unnecessary play on words by pointing to a landowner's right to bring an inverse condemnation action because of the self-executing nature of the takings clause.[80] It is curious why the Court felt obligated to consider this proposition in light of the fact that the *Agins* rule permits a landowner's right to "self-execute" on the constitutional imperative for just compensation. The Court answered the constitutional challenge to the *Agins* rule by restating the rule in language that admits to only one answer. The Supreme Court, having reformed the question presented to its liking, concluded that any taking requires compensation, hardly a novel proposition. Although most

78. The Court stated:

> We . . . have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. Those questions, of course, remain open for decision on the remand we direct today.

Id. at 2384-85 (citations omitted). Although it is probably unfair to quibble with the Chief Justice's language, this quote contains a number of troubling references. For example, the Court invokes the concept of "compensable taking." Does the Court mean that there are non-compensable takings? Similarly, how does the Court's avoidance of the "safety" issue square with Rehnquist's dissenting opinion in *Keystone*?

79. *Id.* at 2385. The Court argued:

> This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.

Id. This, of course, disposes of the taking issue by simple word play, a particularly surprising turn of events in light of the obvious conflict with *Pennsylvania Coal*. Rehnquist posits that the compensation clause is not a limit on governmental power, even though that was the very essence of *Pennsylvania Coal*.

80. *Id.* at 2386.

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takings result from exercises of the governmental power of eminent domain, the Court pointed out that inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. The Court cited *Pumpelly v. Green Bay Co.*[81] to support its statement, even though the case had nothing to do with overzealous regulatory actions.

It is curious that the Court used *Pumpelly* as a doctrinal source for a legal principle that directly conflicts with the Court's holding in *Mugler v. Kansas.*[82] *Pumpelly* preceded *Mugler* by 15 years and was distinguished in *Mugler.* Moreover, in *Pumpelly* the governmental action in question did not involve a prohibition on private use of private land. To the contrary, it involved a physical occupation that irreparably destroyed the value of the property.[83]

Justice Rehnquist nevertheless elevated the *Pumpelly* concept that a physical occupation creates a taking even without a formal exercise of the power of eminent domain to regulatory taking doctrine. To support this proposition, Rehnquist cited *Kaiser Aetna v. United States,*[84] *United States v. Dickinson*[85] and *United States v. Causby,*[86] cases that involved actual invasions of property interests. In doing so, the Court made a leap of faith that overcomes the taking issue by applying the rules for uncompensated physical occupations to the regulatory taking context without explanation or precedent. Using simple word play, the Court avoided the lower California courts' holding and redefined the issue so as to disguise it with tautology. A quote the Court included from *Agins* highlights the emptiness of the Court's analysis:

> In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than in-

81. 80 U.S. 166 (1872).

82. 123 U.S. 623 (1887).

83. The Court stated: "It would be a very curious and unsatisfactory result . . . [if] it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public *it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in affect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use.*" 80 U.S. at 177-78 (emphasis added).

84. 444 U.S. 164 (1979).

85. 331 U.S. 745 (1947).

86. 328 U.S. 256 (1946).

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> verse condemnation is the appropriate relief under the circumstances.

This passage illustrates that the California courts have concluded that a regulation which goes too far is not an "otherwise proper" exercise of governmental power.[87]

The Court next embarked on a remarkably confusing passage. First, citing to *Kirby Forest Industries, Inc. v. United States*[88] and *United States v. Dow*,[89] the Court stated that it previously recognized that government may abandon its intrusion or discontinue regulations.[90] Neither the purpose nor the placement of this statement in the Court's analysis is clear, and it adds nothing to the Court's ultimate decision.[91] Next, the Court stated that it had yet to resolve whether the government, after discontinuing its regulations, must compensate for the period of time during which an ordinance denies a landowner all use of his land.[92] This statement contradicts the Court's prior dismissal of the issue of what constitutes a compensable event as an issue outside the Court's agenda.[93]

The Court then considered the relevance of the temporary nature of the governmental interference. Supplanting the most important issue in the taking controversy, the Court begged the question of whether interference with private use for a short period of time during which an overly restrictive regulation is in effect is a taking. Instead, the Court addressed the self-fulfilling question of whether there can ever be a temporary taking.[94] It is hard to believe that the Court questioned

87. 107 S. Ct. at 2387 (quoting Agins v. Tiburon, 24 Cal. 3d 266, 276-77, 157 Cal. Rptr. 372, 378 (1979)).

88. 467 U.S. 1 (1984).

89. 357 U.S. 17 (1958).

90. 107 S. Ct. at 2387.

91. Initially, it appears that the Court is reflecting on the well-settled principle that the abandonment of eminent domain proceedings, absent actual possession of the object of the condemnation effort, does not effect a compensable taking; however, the balance of the paragraph suggests that the statement has little to do with the Court's analysis and that the concept of abandonment is of no analytical significance.

92. *Id.* at 2387.

93. It is tempting to suspect that the Court has a hidden agenda and is intent on deciding the issue that has evaded Supreme Court articulation because of the absurd finality rules that the Court has erected in lieu of discharging its role to clarify the law. This case avoided the finality rule because the question of a taking was clear, yet the Court attempts to edge into what constitutes a taking.

94. The Court's analytical approach takes a series of non-questions and substitutes them for the merits of the taking issue. No one, of course, ever doubted that there could

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whether temporary takings are compensable under the fifth amendment.[95]

Nevertheless, as strange and oblique as the Court's opinion has been to this point, the Court's next observation is even more surprising. The Court founded its analysis that a non-occupation interference is a taking on *Pumpelly*. In *Pumpelly* the Court characterized governmental intrusions that fell short of an absolute conversion of real property as a taking when the government "destroy[s] its value entirely, can inflict irreparable and permanent injury to any extent...in effect, subject it to total destruction."[96] Simply put, the Chief Justice argued that the inverse condemnation right is based on *Pumpelly*, a case which equated permanent and irreparable injuries to a taking. He then stated that nothing requires that takings be permanent or irreparable. This leap of reasoning conveniently obviates the need for consideration of the real merits of the taking issue.[97]

The Court, after having rambled through the taking issue, announced that it did not intend *First English* to abrogate the principle that the choice to exercise the power of eminent domain is a legislative decision.[98] It is difficult to ascertain why the Court felt compelled to disclaim this proposition. An earlier part of the opinion stated that the question of just compensation was separate from the nature of the governmental power involved.[99] The State of California had obviously ar-

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be temporary takings. The law is settled that a taking for a period of time is a compensable taking. Indeed, the historical antecedents of the just compensation clause are derived from temporary takings, the occupation of private quarters by troops during periods of conflict. The Court's citation of authority for temporary takings indicates the preposterous nature of the "self-executing" question posited by the Court. The Chief Justice concluded:

> 'temporary' takings, which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.

Id. at 2388.

95. The real issue is not whether a taking can be temporary, but whether a temporary interference in all use of property is a taking. That question was not before the Court because of the finality rule.

96. 80 U.S. 166 (1871).

97. The type of governmental interference that the Court has equated with a taking in the physical occupation cases is very different from the interference in an overly restrictive regulation case. Nevertheless, the Chief Justice attempted to avoid the long-standing distinction between occupation cases and regulatory cases by simply ignoring the distinction.

98. 107 S. Ct. at 2389.

99. *Id.* at 2383.

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gued that inverse condemnation violated the separation of powers by allowing the Court to judicially transform a regulatory effort into an exercise of the power of eminent domain. The Court had long since disposed of this question in *Mugler v. Kansas*,[100] and it was not even before the Court in *First English*. Nevertheless, the Court dealt with the issue by simply denying the validity of the State of California's contentions.

The Court further qualified its dictum by reaffirming that the opinion is based on the assumption that the regulations constituted a regulatory taking and is limited to the facts presented. Moreover, Chief Justice Rehnquist suggested that the Court would be confronting different questions in the case of normal delays in obtaining building permits, changes in zoning ordinance, variances, and the like.[101] The significance of this limiting section is unclear. Although impossible to ascertain from the opinion, perhaps the Court is implying that a suspension of all use of property for a period of time will not necessarily constitute a taking.[102]

The Court directs its final disclaimer at the anticipated impact of the holding on the freedom and flexibility of land use planners and municipalities. The Court dismisses raids on the public fisc as a necessary consequence of the Constitution. The Court stated:

> As Justice Holmes aptly noted more than 50 years ago, 'a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'[103]

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100. 123 U.S. 623 (1887).

101. 107 S. Ct. at 2389.

102. The inclusion of this passage is particularly strange given the absolutist view of the compensation clause that was set forth in the Chief Justice's dissent in Keystone Bituminous Coal v. DeBenedictis, 107 S. Ct. 1232, 1253 (1987).

103. Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922). Although the Chief Justice invoked Holmes in support of the Court's decision, he overlooked the fact that Holmes' opinion made it clear that:

> [s]ome values are enjoyed under the implied limitations and must yield to the police power. But obviously, the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be *an exercise of the power of eminent domain and compensation* to sustain the act.

Id. at 413 (emphasis added). The Chief Justice probably ignored this passage because it could not be reconciled with the literal reading of a portion of the Holmes' opinion necessary to the Court's analysis.

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Then, in an apologetic but confusing style, the Court reiterates its holding:

> Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.[104]

Presumably, this passage suggests that when a taking occurs, compensation must be paid, and that the Court did not intend to address when a regulatory taking can exist.[105] Moreover, the Court did not intend to require compensation for every overly restrictive regulation.

Justice Stevens dissented, joined by Justices Blackmun and O'Connor.[106] The dissent criticized the Court for rendering an opinion that would generate a great deal of unproductive litigation. Justice Stevens stated:

> the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in this case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way.[107]

Justice Stevens identified several flaws in the majority's decision. First, he argued that the Court had the authority to decide that the complaint failed to allege a taking under the Constitution. Justice Stevens argued that the allegations of the complaint did not necessarily allege a taking under the precedents of the Court.[108] Justice Stevens began his analysis with the proposition that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[109] The fact that the complaint

104. 107 S. Ct. at 2389.

105. The Chief Justice identified the "safety" justification as a regulatory limit on all use that might not be a taking, and identified "normal delays" for permitting as an interference with all use of property for a period of time that would not be a taking. *Id.* at 2389.

106. Justice Blackmun and Justice O'Connor joined Parts I and III of the Stevens' dissent. Justice Blackmun and Justice Stevens were aligned with each other in all three of the trilogy cases.

107. *Id.* at 2390.

108. *Id.* at 2391.

109. *Id.*

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alleged that the regulations deny the landowner all use of its property does not necessarily mean that the Court must assume that the complaint alleges a taking. The Chief Justice recognized this principle when he admitted that the "safety" justification for regulation might avoid a taking,[110] and when he admitted that not all prohibitions on use for a period of time constitute a taking.[111] According to Justice Stevens, the complaint did not allege a taking, and therefore the Court should not have reached the merits.

In Part II of the dissent,[112] Justice Stevens outlined the second flaw of the majority opinion. Stevens agreed that the Court must find that an overextensive regulation constitutes a taking. Nevertheless, he wrote that when a regulation goes too far, "the Government has a choice: it may abandon the regulation or it may continue to regulate and compensate those whose property it takes."[113] Although a regulation may effect a temporary taking, not every interference rises to the level of a taking.[114] The question, Justice Stevens stated, is whether the regulations have "such severe consequences that invalidation or repeal will not 'mitigate' the damage enough to remove the 'taking.' "[115]

The dissent then observed that an essential element of the regulatory taking equation is the diminution in value test, a concept unique to regulatory takings. The dissent explained that the rationale for this distinction is that although "physical invasions . . . are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings."[116] The failure to recognize this distinction constitutes the second flaw in the ma-

110. *Id.* at 2384-85. He stated:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or *whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations.*

Id. (emphasis added).

111. *Id.* at 2389.

112. Neither Justice Blackmun or Justice O'Connor joined in Part II.

113. *Id.* at 2393.

114. *Id.*

115. *Id.* The dissent's view of the question is that very different rules apply in regard to determining what is a taking in the context of physical occupation and non-occupation activities.

116. *Id.*

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jority's opinion.[117]

According to Stevens, the majority's conclusion that the application of the Los Angeles County ordinance constituted a "temporary taking" ignored the economic analysis required for determining whether a regulatory taking has occurred. The majority ignored the fact that a temporary interference in the private use of property may involve an inconsequential diminution in value that does not constitute a taking. On the other hand, Justice Stevens accepted the proposition that even a temporary use interference substantially affects the value of property so as to constitute a taking. The majority's flaw was in failing to analyze the economic impact of the Los Angeles County ordinance; the Court concluded that it had no choice but to accept the conclusion that the regulation affected a taking.

Justice Stevens stated that the majority's rejection of the distinction between physical occupation cases and regulatory taking cases is based on precedents that did not involve the diminution in value test. Indeed, Justice Stevens wrote that the Court's citation to the temporary occupation cases in the context of a regulatory taking case are not relevant to the proper inquiry—the extent of the diminution of value. He stated:

> Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its useful life—presumably far less than a third? In the former instance, no taking has occurred; in the latter case, the Court now proclaims that compensation for a taking must be provided.[118]

C. Nollan v. California Coastal Commission

The last of the 1987 trilogy of taking cases, *Nollan v. California Coastal Commission*,[119] presented an opportunity for the Court to clarify some of the confusion in *First English* regarding exactions and the takings clause. As in *First English*, however, the Court failed to eluci-

117. It is debatable whether the second flaw actually exists, because the majority purports to accept that a taking has in fact been alleged and that the Court has no alternative but to accept that allegation given the procedural posture of the case. Stevens disagreed and pointed out that the assumption is flawed. That does not necessarily mean that the Court actually reached the issue of what constitutes a taking, the objective of Part II of the dissent.

118. *Id.* at 2395.

119. 107 S. Ct. 3141 (1987).

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date these important issues. Moreover, the disagreement between the majority and the dissent about the standard of review further muddled the discussion.

In *Nollan* a divided Supreme Court invalidated a beach access condition the California Coastal Commission imposed on a building permit it granted. Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Powell and O'Connor, authored the majority opinion. Justices Brennan, Blackmun and Stevens dissented separately.

In *Nollan* the purchaser of a tract of land on the coast sought permission from the California Coastal Commission to construct a home on the lot. The purchaser's contract required that the buyer demolish a small dilapidated bungalow located on the property. The Coastal Commission gave notice that it intended to grant the requested permit. In adherence to Commission policy and practice (at least 43 prior permits in the area contained the same condition), the Coastal Commission conditioned the permit on the Nollan's granting of a public access easement across a portion of the lot along the beach. The area of access was seaward of an eight foot seawall on the lot.

After unsuccessfully protesting the easement requirement before the Coastal Commission, the Nollans challenged the constitutionality of the condition in state court. The Nollans alleged that the condition was a taking of private property for public use without just compensation. Seeking only to have the condition invalidated, the Nollans did not bring an action for inverse condemnation. While litigation was pending, the Nollans closed on the property and, pursuant to the issued permit, constructed a new house in excess of twenty-four hundred square feet.

The California Court of Appeal reversed the lower court decision and upheld the condition as constitutional. The court reasoned that a required conveyance was constitutional where the exaction was sufficiently related to the burdens created by the project. When the California Supreme Court declined to review the case, the landowner appealed to the United States Supreme Court. The Supreme Court reversed the California Court of Appeal, holding that the condition violated the takings clause and was therefore invalid. The Court summarily determined that this exercise of power was beyond the state's legitimate interests.[120] Unfortunately, the Court's opinion, consistent with *First English*, fails to define the limits of the taking clause.

120. *Id.* at 3148. "Whatever may be the outer limits of legitimate state interests in the taking and land use context, *this is not one of them*." *Id.* (emphasis added).

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Furthermore, the Court failed to explain how the taking clause should be applied to the law of exactions. The Court required interested parties to read between the lines.

The Coastal Commission set forth two arguments in support of the beach access condition. First, the Commission maintained that they could deny the permit request because the proposed house would intensify development in the coastal zone and would interfere with visual access to the ocean. This interest is a public value of recognized and significant importance. Second, the Commission argued that the access condition was only a less-intrusive mitigation strategy that allowed the Nollans to proceed with their development plans, despite the Commission's authority to disapprove the proposed intensification of use.

The Court's response to the Commission's position revealed its view of exactions as legitimate police power regulations. First, the Court stated that if California had required the Nollans to provide the public with a permanent easement across their property, the Act would constitute a taking. The majority equated such a requirement with the permanent physical occupation taking cases, such as *Loretto v. Teleprompter Manhattan CATV Corporation.*[121] The issue was whether requiring an uncompensated conveyance as a condition for issuing a land use permit amounts to a taking.[122] For purposes of its analysis, the Court accepted that the Commission could have lawfully denied the Nollan's application for a permit to build a larger house on the lot. Then, in perhaps the most important passage in the opinion, the Court held that the Commission's power to limit development "*must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.*"[123]

For municipalities, the Court's statement is a welcome endorsement of the use of the police power to mitigate the impact of growth through a program of exactions. The Court stated that if a regulatory limitation was valid, then an exaction that serves the same end is also valid.[124] The Court held that this statement of the law is correct, even

121. 458 U.S. 419 (1982) (cited at 107 S. Ct. at 3145).

122. 107 S. Ct. at 3146.

123. *Id.* at 3148 (emphasis added).

124. The Court stated:

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id.

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if the exaction would constitute a compensable taking.[125]

The opinion failed to indicate how strong the nexus must be between the exaction and the stated public purpose. The Court phrased the question as, "what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."[126] It is unclear whether a rational nexus suffices, as the phrase "utterly fails" implies,[127] or whether the Court has, by virtue of its exacting review of the Commission's legislative and factual judgments, erected a new standard of judicial review.

It would be easy to conclude that the Court did not intend to establish a rule of strict scrutiny and that the unique facts of the instant case were so extreme that the Court found that the Commission had utterly failed to establish any nexus between the condition and the stated legitimate interest. In his dissent, Justice Brennan argued forcefully that the majority opinion required a precise fit in support of an exaction. The majority opinion failed to rebut this challenge despite Justice Scalia's attempts to respond to Justice Brennan's dissent.[128]

For the purposes of its analysis, the Court accepted the Commission's assertion that the access condition would be valid if it were reasonably related to the avowed public purpose. The Court stated that the standard of review that it applied was of little importance because it found the instant case unable to meet even the most untailored standards.[129]

According to the Court, in order to justify the permit condition, the Commission advanced the public objective of maintaining visual access to the ocean. Apparently, the Court accepted the proffered objective as legitimate and sufficient to justify denial of the Nollans' permit request. Notwithstanding its acceptance of the Commission's goal of preserving visual access to the beach and ocean, the Court found that:

> [i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nol-

125. *Id.* at 3147. The Court held:

> a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.

Id.

126. *Id.*

127. *Id.* at 3148.

128. *Id.* at 3154-56, 3147 n.3.

129. *Id.* at 3148.

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lan's property reduces any obstacles to viewing the beach created by the new house.[130]

Overlooking the imprudence of invoking the word "impossible" in this day and age, the Court's holding is difficult to understand. First, with little difficulty, Justice Brennan does the impossible by outlining several ways in which the condition mitigates the adverse impacts of the construction of a house five times the size of the prior structure.[131] While the justifications Justice Brennan described may fall short of self-evident truths, they clearly exceed the absolutist meaning of the word "impossible." Moreover, it defies logic to suggest that giving the public a viewing place on the Nollans' lot, seaward of the new house, would fail to eliminate an obstacle to viewing the beach. The majority's explicit statement that providing a viewing spot on the Nollans' property would be constitutional[132] accentuates the illogic of the Court's position.[133] It is one thing for the Court to disagree with the wisdom and judgment of a co-equal branch of government; it is quite another to reach a conclusion of impossibility.

It is difficult to read the majority opinion without recalling the halcyon days of "substantive due process" and wondering what happened to the oft-repeated and well-settled proposition that the Court must refrain from sitting as a super-legislature.[134] On its face, the proposition that a majority of the Court actually intends to establish a takings clause standard of review that harkens back to a much-maligned era of judicial "super legislatures" is unthinkable. Yet, Justices Brennan, Marshall, Blackmun and Stevens clearly believe that the majority is serious, and in a footnote rebuttal to Brennan's dissent, Justice Scalia does not disabuse the reader of an apparent invocation of strict judicial scrutiny.[135] Worse still, the majority opinion appears to say that it is serious about strict scrutiny, under some undefined circumstances. The majority states:

[O]ur cases describe the condition for 'substantial advance[ment]'

130. *Id.* at 3149.

131. *Id.* at 3154-56.

132. *Id.* at 3148.

133. How could a viewing spot be more effective in providing visual access to the ocean and less intrusive of the Nollans' privacy, than providing a viewing spot that is seaward of the Nollans' seawall and accessible not by trespassing through the Nollans' yard but by going along the beach from public holdings to the north and south of the Nollan lot?

134. Day Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952).

135. 107 S. Ct. at 3147 n.3.

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> of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.[136]

Nevertheless, it is possible to suggest that the Court, if faced with a less extreme set of facts, would hold that a development condition involving a concession of property rights need only bear a rational relationship to the public interest that is intended to be served. Only those exactions which "utterly fail" to relate to the stated purpose will be invalid.

The *Nollan* case may not represent a significant departure from settled principles of law—an exaction is constitutional, as is any other regulation, if it bears a rational relationship to, or substantially advances a legitimate public interest that unmitigated development would otherwise threaten.

More important than the decision itself, however, may be the significance of *Nollan* in the context of the Court's decision in *First English*. The Court in *First English* failed to explain the circumstances under which it would determine that a regulation destroyed all uses of property. Alternatively, the Court failed to clarify what uses it would consider sufficient to avoid imposing the taking label. The *Nollan* case suggests that, like those of Mark Twain's demise, reports of the downfall of restrictive land use controls were premature. Both the majority opinion and Justice Brennan's dissent assume without discussion that the Coastal Commission could have lawfully denied the Nollans' application for a permit without depriving them of all use of their property.[137] It is true that the Court abstained from ruling that the permit denial constituted a taking. Nevertheless, the majority recognized the

136. *Id.* at 3150.

137. *Id.* at 3148, 3152. The Court stated:

> The Commission argues that these permissible purposes include protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a development shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—*in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of cumulative impact produced in conjunction with other construction) would substantially impede these purposes*, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

Id. at 3147 (emphasis added).

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validity of the outright denial of the permit. This is particularly evident in light of Justice Brennan's dissent and the majority's rebuttal of those portions of Brennan's opinion.[138]

In his dissent, without the qualifier the majority invoked, Justice Brennan stated that "[t]he Coastal Commission . . . could have denied the Nollans' request for a development permit, *since the property would have remained economically viable without the requested new development.*"[139] Since the bungalow on the lot was in disrepair and incapable of being rented,[140] the other viable uses Justice Brennan deemed constitutionally sufficient to avoid a regulatory taking did not involve what the real estate industry conceives of as economically viable uses.

More importantly, Justice Brennan deliberately considered the concerns that underlie the Court's taking jurisprudence. First, Justice Brennan clarified that notwithstanding the contrary implication in *Loretto v. Teleprompter Manhattan CATV Corp.*,[141] a physical intrusion does not necessarily constitute a compensable event.[142] This proposition gains significance because the author of the majority in *Loretto,* Justice Marshall, joined in Brennan's dissenting opinion in *Nollan.* Moreover, Justice Brennan stressed the importance of whether the governmental activity that burdens private use is a result of a private initiative to intensify use of the property. If it is, Brennan expressly stated that the limitations are less likely to constitute a regulatory taking.[143]

In addition, Justice Brennan took a sharp look at the economic impacts of the regulation at issue and measured them in the context of the average reciprocity of advantage. In doing so, he clearly indicates that a balancing of public interests is appropriate. Justice Brennan implies that the Court would sustain restrictive regulation if the economic impact to the landowner is less than the public harm sought to be avoided.[144] The economic impact is not an absolute element in the Brennan equation for a regulatory taking. He stated, "Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development."[145]

138. *Id.* at 3154-56, 3147 n.3.
139. *Id.* at 3152 (emphasis added).
140. *Id.* at 3143.
141. 458 U.S. 419 (1982).
142. 107 S. Ct. at 3157.
143. *Id.* at 3158.
144. *Id.*
145. *Id.*

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Finally, Justice Brennan discussed the concept of investment-backed expectations. He explained that the reasonableness of such expectations depends upon the prevailing planning and regulatory climate and that state policy, expressed by statute or constitution, prescribes the legitimacy of development expectations. In other words, compensable interests may not be formed in contradiction of state policy or law.

It is clear that Brennan does not view construction of improvements as an immutable right of property.[146] In summary, Brennan reveals that his theory of temporary regulatory takings is nothing more than the constitutional imperative that *if* a regulation goes too far, compensation is required. Few well-conceived regulations are likely to have such an effect:

> I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking.[147]

III. WHAT DOES IT ALL MEAN?

It is not easy to comprehend the implications of the seven opinions that comprise the trilogy, and it is even more difficult to synthesize the three cases. Nevertheless, there are a number of obvious points that warrant discussion.

What does the trilogy mean? Does it represent a significant turning point in the law, or is it simply a restatement of well-settled principles? The answer is relatively simple with regard to *Keystone*. The legal principles advanced are basically consistent with prior decisions, and the only remarkable aspect of the case is the outcome in light of the result in *Pennsylvania Coal v. Mahon*.[148] In *Nollan* the Court ventured into the novel area of exactions, and the opinion was surprisingly supportive of local land use regulation. Few commentators would have predicted that a conservative appointee to the Court would approve of the provision of a viewspot on the owner's lot as an appropriate condition to the building permit.

It is more difficult to characterize *First English*. Depending on how one reads the case, *First English* is either a simple restatement of an established principle of law or a dramatic turning point in land use law. The national press and others believe that the Court reached the heart

146. *Id.* at 3160 n.10.

147. *Id.* at 3162.

148. 260 U.S. 393 (1922).

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of the taking issue, while others contend that the case adds little to taking jurisprudence.

Although the majority opinion raised some doubt in *First English*, it appears that the Court has reaffirmed that the analysis of alleged regulatory takings is distinct from the analysis appropriate for physical occupation takings. For physical occupations, an actual invasion constitutes a taking unless the taking is militated as a development permit condition that substantially advances a legitimate public purpose as defined in *Nollan*. The analysis of whether a particular regulatory action effects a taking turns on the economic impact of the action, unless there is a countervailing public policy basis, such as normal delay or safety, to sustain the limitation.

In *First English* the Court implied that a regulation that deprives a property owner of all use of his property, for even a limited period of time, constitutes a taking. Moreover, the Court undermines the "all use" analysis by pointing out at least two situations where it would not apply: required safety actions and normal delays. Nevertheless, a regulation that deprives a property owner of all use of his property is likely to be a taking except in very limited circumstances. In *Keystone* the Court failed to address directly the question of what would constitute a taking, because the Court found that the statute in question presented no real danger of effecting a taking.

It is also clear, notwithstanding the Chief Justice's dissent in *Keystone*, that a regulatory taking analysis does not focus on the discrete units of property that have been restricted. Rather, the analytical unit of property is the owner's entire parcel; in *Keystone* the relevant unit of property was all of the Coal Association's holdings. It is unclear, however, how courts should determine the unit of property when the property owner owns only an individual segment of property. Consider, for example, how courts would identify the unit of property if the plaintiff in *Penn Central* owned only the air rights above Grand Central Station. Would the unit of property be limited to the air rights? Could a clever litigant alter the unit of property by selling the support estate to a third party?

In a final analysis, the cases mean that the Court is still confused and grasping for a doctrinal basis for resolving the taking issue. In part, the analytical problems the Court experiences are the natural product of attempting to resolve the taking issue by building on an erroneous and misplaced view of *Pennsylvania Coal*. Indeed, the Court's difficulties in articulating a coherent set of taking principles is due to the faulty

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premise on which the Court bases its contemporary taking jurisprudence. More specifically, that faulty premise is that Justice Holmes intended to hold that a regulation that goes too far effects a taking. The plain language of Holmes' opinion belies that supposition, and the failure to recognize this doctrinal flaw condemns the Court's analysis to tautology. The simple fact is that Holmes used the word "taking" in a metaphorical sense throughout the opinion in *Pennsylvania Coal*, and the failure to accept the plain language of the opinion *in pari materia* has much to do with the muddled state of the law of the taking issue.

That is not to say that a regulation can never effect a taking. Rather, the point is that the taking issue emanates from sources other than Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*, and other precedents more clearly define the contours of the law of regulatory takings. The origins of contemporary taking jurisprudence are, as Chief Justice Rehnquist noted in *First English*,[149] found in *Pumpelly v. Green Bay Co.*[150] In *Pumpelly* a property owner demanded compensation for the total destruction of his property resulting from governmental action. The Supreme Court recognized that the taking clause constrained governmental power. The Court held in *Pumpelly* that the fact that the government refrained from instituting eminent domain proceedings failed to negate the constitutional imperative for compensation.[151]

On many occasions, the Court has reaffirmed the principle laid down in *Pumpelly*. In addition, *United States v. Clarke*[152] points out that governmental actions other than condemnation proceedings may require payment of just compensation. The use of airspace[153] is another familiar example of a deprivation of private property recognized as a taking even though the landowners refrained from initiating condemnation proceedings. Thus, *Pumpelly* and its progeny established that

149. 107 S. Ct. 2378.

150. 13 Wall. 166 (1872).

151. *Id.* at 177-78. The Court found:

> It would be a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use.

Id.

152. 445 U.S. 253 (1980).

153. United States v. Causby, 328 U.S. 256 (1946).

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governmental actions other than exercises of the power of eminent domain, including regulations, may effect a taking.

The *Pumpelly* principle does not mean that a regulation limiting private use necessarily effects a taking. Given the nature of the interferences which characterized the takings in cases such as *Pumpelly*, it is difficult to equate a regulation that temporarily displaces a landowner's private use of his property with one that allows flooding, total destruction and aviation use. Yet that is the leap of faith that the Court apparently hopes to achieve in *First English*.

Recognizing the implication of the Court's opinion, the dissent in *First English* argued that the mere interference in use does not amount to a taking. The dissent's discussion of the value of property in the dimension of time seems logical and consistent with the Court's precedents. Therefore, it would be imprudent to assume that the Court has actually rejected this analysis. To the contrary, it seems logical to infer that the *First English* Court intentionally ignored the question of whether the challenged regulations which temporarily deprived the owner of all use of his property constituted a taking.

What is needed is a more precise and careful analysis of the taking issue and a holding that encompasses an alleged taking without a physical occupation. The Court correctly pointed out that the nature of the analysis is basically economic. This form of analysis, however, is not absolute due to the temporal nature of regulatory impacts, as well as the possibility of an overriding public interest. Of course, if a regulation goes beyond simply limiting private use and commands public use or total destruction of a property interest, then courts should find a taking. On the other hand, if the only impact on property is a temporary interference, then the established principle that a mere diminution in value is not a taking means that on remand the regulation in *First English* will fall short of a taking.

For decades, the taking issue has raised controversy among land use scholars and practitioners. Nothing the Court did in the 1987 taking issue trilogy lessened the zeal of the advocates and debaters. In other words, Yogi Berra was right: "It ain't over 'til it's over."

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COMMENTS

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